82-406

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

WILBUR LEE AUERBACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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AMY CHRISTENSEN COUCH
on the Petition

QUESTIONS PRESENTED

I. Whether the defendant received a fair trial due to flagrantly prejudicial, repeated instances of prosecutorial misconduct, which denied the defendant his Fifth Amendment right to due process, particularly because the evidence against him was not overwhelming, and the Eighth Circuit did not follow its own standard of review, nor that of the Iowa Supreme Court, nor that of the United States Supreme Court, in evaluating the prejudicial effect of the misconduct on the jury verdict.

II. Whether the defendant's Fifth Amendment right to due process was violated by unreasonable, prejudicial preindictment delay.

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IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

WILBUR LEE AUERBACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Wilbur Lee Auerbach respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on July 6, 1982.

OPINION BELOW

The opinion of the Court of Appeals (Heaney, McMillian and Arnold) will be published at 682 F.2d 735 (8th Cir. 1982), and appears as Appendix A.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was filed on July 6, 1982. (See Appendix A). The petitioner filed no motion for a rehearing by the panel, nor one for a rehearing en banc. The petitioner has not requested nor received an order granting an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

CONSTITUTIONAL PROVISION:

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioner was convicted after a jury trial before the United States District Court for the Southern District of Iowa (Vietor, J.) of engaging in the business of dealing in firearms without a license in violation of 18 U.S.C. §§922(a)(1) and 924(a), and conspiracy in violation of 18 U.S.C. §926(a)(1). He was fined $5,000 on the dealing count, and given a suspended sentence on the conspiracy count, and was placed on probation for a period of three years. The conviction was affirmed by the United States Court of Appeals for the Eighth Circuit.

The petitioner, Wilbur Auerbach, is a sixty-one year old man with no prior criminal record who owns and operates a Standard Service Station in Atlantic, Iowa. At the time of the events in question, his son Tom worked with him at the station.

On March 22, 1979, Special Agents Petersen and Wilber, of the Bureau of Alcohol, Tobacco and Firearms, initiated contact with the Auerbachs by calling Tom Auerbach at the station. The agents then visited the station and purchased a shotgun and a Japanese rifle. To support their theory that the defendants were doing something illegal, and knew that this was not just a casual sale of personal firearms, the agents testified that when they visited the station, the Auerbachs turned off the lights so that it appeared the station was closed. However, this testimony was contradicted by Agent Petersen's own testimony at the hearing on the Motion to Dismiss, and by the testimony of Gary Richter, a former employee of Wilbur's, that the agents came to the station in the afternoon.

Wilbur Auerbach testified that he was not interested in selling to the agents, but only did so after they continually approached him and pressured him to sell. The Auerbachs never initiated contact with the agents, although they had been given the agents' telephone number.

Testimony as to the exact dates was conflicting, but on approximately March

24, the agents again went to the station and purchased a revolver. On March 27 and 28, and April 5, the agents went to the station attempting to purchase firearms, but none were purchased. On April 11, the agents met Bradley Cramer at the station and purchased three rifles from him. The agents testified that they paid Wilbur $20 for introducing them to Mr. Cramer. Cramer was charged with the Auerbachs, but the charges were dismissed by the government for lack of evidence immediately prior to trial. On April 26, the agents went to the station, but no guns were purchased. On May 11, the agents again went to the station to purchase guns. Wilbur went to someone's home and came back with a rifle, which he sold to the agents along with a rifle of his own. This was the last sale made to the agents.

In September, 1979, Agent Petersen shaved off his mustache and beard, completely destroying his undercover appearance. Agent Petersen testified that he periodically telephoned the Auerbachs through October, 1980, but no further purchases were ever made, and no personal contacts were made.

In February, 1981, the case was referred to the U.S. Attorney. On March 25, 1981, two years after the firearms transactions, the Grand Jury indicted Wilbur and Tom Auerbach and Bradley Cramer for conspiracy and firearms violations. As stated above, the charges against Cramer were dropped. The Auerbachs were found guilty. Only Wilbur Auerbach

appealed, and his conviction was affirmed by the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

The defendant did not receive a fair trial due to flagrantly prejudicial, repeated instances of prosecutorial misconduct, which denied the defendant his Fifth Amendment right to due process, particularly because the evidence against him was not overwhelming, and the Eighth Circuit did not follow its own standard of review, nor that of the Iowa Supreme Court, nor that of the United States Supreme Court, in evaluating the prejudicial effect of the misconduct on the jury verdict.

The defendant's Fifth Amendment right to due process was violated by unreasonable, prejudicial preindictment delay.

I. Prosecutorial Misconduct.

The record in this case clearly shows that the prosecutor repeatedly engaged in unfair, prejudicial conduct throughout the course of the trial. He was guilty of numerous violations of the motion in limine granted by the trial judge; of introducing evidence of other crimes; of implying, by his questions, prejudicial facts which were not true; of implying by his questions that the defendants were

guilty of other crimes which they were not and which were irrelevant to this case; of grossly misstating the record in his closing argument; of testifying as to the purpose of the Gun Control Act; of stating prejudicial facts which had no basis in the evidence; of telling the jury that Tom lied about his prior conviction when he had not; of telling the jury that these were the types of weapons used by snipers; of telling the jury that by raising an entrapment defense, the defendants were saying they were guilty of the crime; of telling the jury it was their job to enforce the law; and of withholding information from the defense attorney which should have been disclosed.

It would be impossible without reading the record to realize the full extent of the misconduct. A few examples follow.

During the investigation leading up to the Auerbachs' arrest, the agents' theory was that the defendants were dealing in stolen weapons and other merchandise. However, no such evidence was obtained. The firearms sold by the defendants were not stolen. The guns they sold were Wilbur Auerbach's own personal guns, or on one occasion, a gun owned by an acquaintance. The agents paid for the first two guns they purchased from Wilbur with cash and several electric drills they represented were stolen. On one other occasion, the agents testified they sold Wilbur 30 cartons of cigarettes which they pretended were stolen. Therefore, prior to the trial, the defendants were granted

a motion in limine which prevented the introduction of evidence of the defendants' involvement in the purchase or sale of stolen property unless such evidence was specifically statements by the defendants to the agents that they would trade guns for stolen property. The prosecutor repeatedly violated the motion in limine. He also repeatedly introduced evidence of other crimes, some of which had no relevance whatsoever to this case. The prosecutor questioned Agent Petersen about theft of guns from a sporting goods store, which had nothing to do with these defendants or this trial. He questioned Mr. Cramer about his alleged dealing in stolen firearms, which Cramer denied. He elicited testimony from Agent Petersen that he was investigating potential dealing in stolen firearms, and that he went to the station "to buy hot jewelry and firearms." The prosecutor also elicited testimony from Agent Petersen as to numerous instances of statements by the defendants and Cramer in which they supposedly made remarks implying they dealt in stolen property, none of which had anything to do with trading for guns. He stated, in the jury's presence, that "there has been testimony that Mr. Auerbach is engaged in dealing in stolen property in this Court", which was absolutely false. In his closing argument, the prosecutor commented on all of these things. The clear statement to the jury was that these defendants were "bad men" who, besides dealing in firearms without a license, the crime for which they were accused, dealt in stolen

property. The prosecutor continued to introduce this type of evidence after a motion in limine had been obtained, and after numerous objections by the defense had been sustained. The testimony was highly improper and prejudicial. It "can hardly be characterized as an inadvertent slip of the tongue." U.S. v. Conley, 503 F.2d 520, 523 (8th Cir. 1974).

The Eighth Circuit opinion noted that the defendant did not object to the agents' testimony regarding the sale of cigarettes which had been described as stolen. The Court noted that the evidence was not admissible under any of the exceptions to the general rule that "other crimes" evidence is inadmissible, but stated that the defendant "has not demonstrated that the admission of this evidence so adversely affected substantial rights as to result in a miscarriage of justice." This was not the correct standard of review regarding the admission of this evidence, since the defendant had obtained a motion in limine prior to trial preventing the prosecution from presenting exactly this sort of evidence, and the defense moved for a mistrial at the earliest opportunity to do so out of the presence of the jury. Under Iowa law, once "a motion in limine is resolved in such a way it is beyond a question whether or not the challenged evidence will be admitted during trial, there is no reason to voice objection at such time during trial. In such a situation, the decision on the motion has the effect of a ruling." State v. Miller, 229 N.W.2d 762, 768

(Iowa 1975). Thus, it was error for the Eighth Circuit to follow the standard of review for plain error, particularly when the defense moved for a mistrial as soon as possible. An objection to this prejudicial questioning at the trial would only have served to focus the jury's attention on the testimony. Clearly, the purpose of obtaining the ruling in the first place was that no amount of objection or curative instruction could have removed the prejudicial effect of the evidence on the jury. Admission of this evidence, along with all the rest of the "other crimes" evidence prejudiced the jury against the defendants by telling the jury that they should convict the defendants because they were bad men. See U.S. v. Weir, 575 F.2d 668 (8th Cir. 1978). "[N]othing makes it more difficult for a defendant to receive a fair and unbiased trial than for the jury to think that the defendant or his acquaintances are men of bad character." U. S. v. Clemons, 503 F.2d 486, 491 (8th Cir. 1974), quoting U. S. v. Crawford, 438 F.2d 441, 446 (8th Cir. 1971).

By his questions, the prosecutor on several occasions implied prejudicial facts which were not true. He asked Agent Petersen if Wilbur Auerbach indicated the source of a ring and a watch he offered for sale. The intent of this question was to imply that the articles were stolen, which they were not. The prosecutor asked Special Agent Wilber if Mr. Auerbach had ever registered his gun, implying that he had violated a registration requirement,

which he knew to be nonexistent in Iowa. He asked the agent if he had ever been given a concealed weapons permit for the gun, which had no relevance to this case whatsoever, but which again implied a violation of state laws.

The prosecuting attorney's closing argument contained inflammatory, highly prejudicial remarks calculated to bias the jury. He also made numerous false statements which were unsupported in the record. He testified as to Congress' intent in passing the Gun Control Act. He stated that Tom Auerbach was "the guy who goes out into the community, drums up the business", and stated Tom had called the agents. These statements had no support in the record, and were in fact false, since neither defendant ever approached either of the government agents at any time. The prosecutor stated that Gary Richter, a young man who worked for Mr. Auerbach at the time, corroborated the testimony of the agents as far as it went, and that he could not remember anything else about the transactions. In fact, Gary's testimony was significantly at variance with the agents, and damaging to the prosecution. The prosecutor stated that in most cases, the defendants went out and procured firearms to sell the agents, which was false and unsupported by the record. The prosecutor told the jury that Tom Auerbach lied about his prior conviction, which he had not.

In his rebuttal argument, the prosecutor stated that the types of

weapons sold by the defendants were the types of weapons used by snipers around the country. This was particularly prejudicial, because the trial was held just after the attempted assassinations of President Reagan and Pope John Paul II. This was not a prosecution for possession of illegal weapons, and this remark insinuated that it was. The remark was totally irrelevant to any issue in this case, and its purpose and effect were to arouse the prejudice of the jury. The prejudicial impact on the jury was incalcuable, particularly when combined with the prosecutor's repeated insinuations that there were stolen weapons involved, and that the defendants were bad men who had committed numerous other crimes. In addition, soon after the above remark, the prosecutor told the jury that (1) the defendants were saying that they did the crime by raising the defense of entrapment, and that (2) it was the jury's job to enforce the law.

The misconduct in this case was not "slight, nor confined to a single instance", but "was pronounced and persistent". Berger v. United States, 295 U.S. 78, 89, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Where there are many errors during a trial, the cumulative effect of them must be weighed. See Berger, id.; U.S. v. Bledsoe, 531 F.2d 888, 892 (8th Cir. 1976).

In U.S. v. Weir, 575 F.2d 668 (8th Cir. 1978), the Court considered the effect of improper prosecutorial argument

along with erroneous admission of "other crimes" evidence. The Court stated that the improper argument, standing alone, was not enough for reversal, but that the combined effect was "a presentation to the jury that the defendants were 'bad' men and should be convicted because they were 'bad'", and that reversal of the conviction was required. Id at 672.

In this case, the Eighth Circuit considered the cumulative effect of the prosecutor's improper remarks, but did not consider the cumulative effect of all the errors at trial together. The Court stated:

> We note that the cumulative effect of the prosecutor's improper remarks upon the jury came dangerously close to requiring reversal in the present case. We affirm, however, because of the prompt remedial action taken by the district court and relatively strong evidence. (Emphasis added)

In addition to not considering the cumulative effect of all the errors at trial, the Court erred in assessing the evidence as "relatively strong." At the hearing on the Post-Trial Motions, the District Court judge stated he thought the evidence was not overwhelming, that "certainly it wasn't a strong case", and that "the evidence was not strong on any of the counts", but he felt it was adequate to sustain the jury verdict. In evaluating the effect of prosecutorial

misconduct, the Court is to consider the amount of evidence against the accused. U.S. v. Splain, 545 F.2d 1131, 1135 (8th Cir. 1976). In this case, even the trial judge stated the evidence was not strong. The evidence to show that the defendants were engaged in the business of dealing in firearms was very weak. The evidence merely showed that the defendant sold four of his personal guns to the agents, one gun of an acquaintance, and introduced the agents to Mr. Cramer. The government's evidence was based on the controverted statements of two special agents who made no notes or reports of the transactions until almost two years after their occurrence. If the Eighth Circuit had balanced the cumulative effect of all errors at trial against the weak case against the defendant, it is clear that reversal would have been required.

The standard for evaluating the effect of errors on the jury verdict was stated in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946):

> And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision...If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict, and the judgment should

> stand...But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to corclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. Id., at 764-65 [citations omitted].

The Eighth Circuit has followed the Kotteakos standard in many cases. United States v. Norton, 639 F.2d 427, 429 (8th Cir. 1981); United States v. King, 616 F.2d 1034, 1040 (8th Cir. 1980); United States v. Weir, 575 F.2d 668, 671 (8th Cir. 1978); United States v. Bledsoe, 531 F.2d 888, 891 (8th Cir. 1976); United States v. Conley, 503 F.2d 520, 524 (8th Cir. 1974); Evanson v. United States, 316 F.2d 94, 96 (8th Cir. 1963).

The Eighth Circuit in this case did not evaluate the effect of the errors on the jury verdict whatsoever. Rather, the Court evaluated the errors separately, and used the standard of requiring the defendant to demonstrate that the erroneous admission of other crimes

evidence "so adversely affected substantial rights as to result in a miscarriage of justice." This is the standard which has been used in plain error cases where no objection was made to the introduction of erroneous evidence. See United States v. Segal, 649 F.2d 599 (8th Cir. 1981). In the Auerbach case, defense counsel objected to most of the errors, or had obtained a motion in limine coupled with a motion for mistrial. Therefore, the Court should have evaluated the cumulative effect of the numerous errors on the jury verdict. See Kotteakos, supra at 764-65.

The cumulative effect of the prosecutorial misconduct clearly affected the jury verdict, and prejudiced the defendant's right to a fair trial. Particularly because the evidence of guilt was not overwhelming, the cumulative effect of the error cannot be considered harmless.

The prejudicial effect of the erroneous admission of evidence, repeated instances of prosecutorial misconduct during the trial, and improper closing argument could easily have made the difference between conviction and acquittal. "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." Berger v. United States, supra at 89.

Prosecutors must be told that their obligation "in a criminal prosecution is

not that [they] shall win a case, but that justice shall be done." Berger, supra at 88. If they violate this rule, they should receive more than a slap on the wrist. Allowing this conviction to stand would be putting a seal of approval on the prejudicial prosecutorial tactics used in this trial.

II. The defendant's Fifth Amendment right to due process was violated by unreasonable, prejudicial preindictment delay.

Sales of firearms to the agents occurred in March through May of 1979. The indictment was not filed until March 25, 1981, and trial was held during June of 1981. The applicable "statute of limitations does not fully define the [defendant's] rights with respect to the events occurring prior to indictment." United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

In evaluating a Fifth Amendment claim of denial of due process from unreasonable, prejudicial preindictment delay, the Court is to balance the reasonableness of the delay against any resulting prejudice to the defendant. United States v. Barket, 530 F.2d 189, 193 (8th Cir. 1976). The weakness of the case against the defendant is another factor relevant to this balancing process. Id. at 194.

The lower courts held that the preindictment delay was due to ongoing undercover investigations, and was

necessary to protect Agent Petersen's undercover identity. Special Agent Petersen testified that he periodically called the Auerbachs through the fall of 1980. This testimony is unsubstantiated, and no further personal contact or purchases were ever made. In addition, Agent Petersen admitted he shaved off his mustache and beard, thus completely destroying his undercover appearance, in September, 1979. Therefore, there was no need whatsoever to protect the agent's undercover identity after September, 1979, since he, by his own action, destroyed that undercover identity.

Furthermore, the delay was clearly prejudicial to the defendant, considering the particular nature of the charges against him. At the hearing on the Motion to Dismiss, held one month before the trial, Special Agent Petersen stated that he could not recall the specifics of conversations and he would have to rely on his report. (The report was made January 27, 1981 - a year and a half after the events in question.) The report contains very little actual conversation. Yet at trial, Agent Petersen testified to numerous, detailed conversations.

These detailed conversations were the only evidence available to distinguish between a few casual, isolated sales of the defendant's own hunting guns, which is not a crime, and being "engaged in the business of dealing", which is a crime. See, United States v. Baker, 397 F.Supp. 1122, 1123-34 (E.D.Mo. 1975). It was

specific conversation which made the difference between whether the agents kept coming back on their own, or whether Wilbur supposedly kept telling the agents to come back. (Agent Petersen's report says that once Wilbur and Tom said to come back. Agent Wilber's report says nothing whatsoever about coming back.)

Thus, in this particular case, it was actual conversation, not just actions, which convicted the defendant. Without the conversations, there could have been no conviction. Therefore, there was actual prejudice to the defendant from the two-year delay. The defendant could not remember specific conversations two years old clearly enough to assist effectively in his own defense. He was left to prove a negative, that the agents' testimony of specific conversation did not happen.

The defendant's right to due process was violated when the government agents held on to weak information regarding the defendant's involvement in an alleged crime for almost two years without justification. The mere fact that an agent says he is involved in ongoing investigation cannot justify lengthy delay when the agent's own testimony showed he had no undercover identity a few months after the purchases. Additionally, when questioned about the alleged ongoing investigation, he admitted the investigation after May 11, 1979 did not have anything to do with Mr. Auerbach, and that in any investigation after May 11, the agent was only a collateral witness. The

fact that there may have been some investigation somewhere in the Atlantic, Iowa area by the Bureau of Alcohol, Tobacco and Firearms does not justify not turning in the information about these particular defendants when the other investigation had nothing to do with these defendants and there was no need to protect the agent's undercover identity after September, 1979.

Therefore, the indictment against Mr. Auerbach should have been dismissed.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Des Moines, Iowa

August 31, 1982

Respectfully Submitted,

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AMY CHRISTENSEN COUCH
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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 81-1737

UNITED STATES OF AMERICA,	*	
	*	APPEAL FROM THE
Appellee,	*	UNITED STATES
	*	DISTRICT COURT
v.	*	FOR THE SOUTHERN
	*	DISTRICT OF IOWA
WILBUR LEE AUERBACH,	*	
	*	
Appellant.	*	

Submitted: February 12, 1982

Filed: July 6, 1982

Before HEANEY, McMILLIAN and ARNOLD, Circuit Judges

McMILLIAN, Circuit Judge.

Wilbur Lee Auerbach appeals from a final judgment entered in the District Court[1] for the Southern District of Iowa upon a jury verdict finding him guilty of engaging in the business of dealing in firearms without a license and conspiracy to engage in the business of dealing in firearms without a license in violation of 18 U.S.C. §§922(a)(1), 924(a), 926(a). The district court fined appellant $5000, suspended imposition of sentence on the conspiracy count and placed appellant on probation for three years. For reversal appellant argues that (1) evidentiary errors denied him a fair trial, (2) evidence of other crimes was improperly admitted, (3) the prosecutor's closing arguments were improper and prejudicial, (4) preindictment delay denied him due process, and (5) the government's conduct of the investigation constituted entrapment. For the reasons discussed below, we affirm the judgment of the district court.

In the spring of 1979 special agents of the Bureau of Alcohol, Tobacco and Firearms began an undercover investigation in the southern Iowa area. The original focus of the investigation was firearms violations, but the scope subsequently widened to include narcotics and stolen property. According to the government's theory of the case, appellant

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[1]The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

and his son Thomas Auerbach ran a firearms business from their gasoline service station in Atlantic, Iowa. From March through May 1979 the undercover agents purchased five firearms [2] from the Auerbachs and two firearms from a third party contacted by the Auerbachs. On one occasion the Auerbachs purchased half a case of "stolen" cigarettes from the undercover agents. The undercover agents testified that during the transactions at the service station the Auerbachs closed the door of the service bays and turned off the pumps and the lights.

The undercover agents maintained contact with the Auerbachs through the fall of 1980 but made no further purchases. In February 1981, almost two years after the firearms transactions, the case was referred to the United States attorney's office. The grand jury indicted appellant, Thomas Auerbach and

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[2]The undercover agents purchased a shotgun and a Japanese rifle on March 22, 1979; a revolver on March 24, 1979; and two rifles on May 11, 1979. On March 27 and 28, 1979, the undercover agents discussed buying the rifles. On April 11, 1979 the undercover agents purchased two firearms from Bradley Cramer, who had been contacted by the Auerbachs. Cramer was indicted for firearms violations at the same time as the Auerbachs, but the government dismissed the counts against him for lack of evidence.

Bradley Cramer for conspiracy and firearms violations in March 1981. The charges against Cramer were subsequently dismissed. Appellant and his son were codefendants. Appellant was found guilty of conspiracy to engage in the business of dealing in firearms without a license and engaging in the business of dealing in firearms without a license; Thomas was found guilty and two counts of unlawful possession of a firearm. Only Wilbur Auerbach has appealed.

Appellant first argues that certain evidentiary errors denied him a fair trial. Appellant argues that several comments made by the district court indicate confusion and uncertainty about the fairness of the trial. We must disagree. One remark was made during the hearing on post-trial motions; the district court acknowledged that there had been several problems during trial but then concluded that appellant has received a fair, although not perfect, trial. Another remark made by the district court referred to the defense counsel's delay and lack of specificity in making objections and the difficulty this caused the district court in conducting the trial.

Appellant also argues that the prosecutor improperly referred to the defendants collectively as "they" and failed to differentiate between them. We have examined the pages in the record cited by appellant. At one point the district court sustained a defense objection to the use of "they" and

directed the witness and the prosecutor to differentiate between the defendants. At the other points the prosecutor or the witness indicated that "they" meant both Auerbachs, or the reference to both Auerbachs was clear from the context, or the use of the word "they" was not challenged.

Appellant also argues that hearsay and irrelevant and immaterial statements were erroneously admitted and that the cummulative effect of these errors was so prejudicial as to deny him a fair trial. Defense counsel did not object to any of the alleged hearsay and objected to only two of the statements challenged on appeal as irrelevant and immaterial. One objection[3] was sustained; the other objection[4] was overruled, but the reason advanced at trial was not the same one raised on appeal. Appellant has failed to preserve these evidentiary questions for appellant review. We have carefully reviewed the record and find no plain error.

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[3]Defense counsel objected to questions about the registration requirements for concealed weapons.

[4]Defense counsel objected to the improper use of memoranda to refresh recollection; on appeal appellant argues that the answer improperly referred to persons Thomas Auerbach had met while in the penitentiary, thus emphasizing his criminal record.

Appellant next argues that evidence of other crimes was improperly admitted. The prosecution introduced evidence about the burglary of a sporting goods store, appellant's purchase of "stolen" cigarettes, appellant's failure to have or issue concealed weapons permits, and Thomas Auerbach's prior felony conviction and serving time in the penitentiary. The reference to the sporting goods store burglary, which involved the theft of guns, came in during the redirect examination of one of the special agents. The prosecutor attempted to establish that the special agents had kept notes about the progress of the investigation; one of the events noted by the agents was the burglary of the sporting goods store. Defense objections to the improper use of memoranda to refresh the witness's recollection and to the answers as hearsay were sustained. None of the firearms involved in the present case was stolen. Defense counsel's objection to the prosecutor's questions about concealed weapons permits was sustained by the district court. The district court also cautioned the jury that no issue in the present case involved any violation of Iowa law governing the registration of concealed weapons and that there was no evidence that either defendant has violated such laws. The reference to Thomas Auerbach's prior felony conviction and to his serving time in the penitentiary was cumulative; Thomas Auerbach's prior felony conviction was already before the jury as one of the elements of the unlawful possession of a

firearm charge. We note our disapproval of the prosecutor's repeated questions about why Thomas Auerbach was in the penitentiary in the face of defense objections which were sustained by the district court.

Appellant did not object to the special agent's testimony about selling appellant cigarettes which had been described as stolen. We have carefully reviewed the record and find no plain error.[5]

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[5]As noted in United States v. Robbins, 613 F.2d 688, 693-94 (8th Cir. 1979), citing United States v. Frederickson, 601 F.2d 1358, 1365 (8th Cir.) (citations omitted), cert. denied, 444 U.S. 934 (1979),

> [t]he rules for the admission of other crimes evidence are well established, and the court recently set out the requirements which must be met: (1) a material issue on which other crimes evidence may be admissible has been raised; (2) the proffered evidence is relevant to that issue; (3) the evidence of other crimes is clear and convincing. In addition, to be admissible on such issues as intent, knowledge or plan, the other crimes evidence must relate to wrongdoing "similar in kind and reasonably close in time to the charge at trial." Finally, evidence otherwise admissible

Appellant next argues that certain remarks made by the prosecutor in closing argument denied him a fair trial.

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5 continued

> under Rule 404(b) may be excluded under Fed. R. Evid. 403, "if its probative value is substantially outweighed by the danger of unfair prejudice."

It is questionable whether the puchase of "stolen" cigarettes was relevant to proof of the crimes charged here, conspiracy to engage in the business of dealing in firearms without a license and engaging in the business of dealing in firearms without a license. The evidence in the present case was relatively straightforward; it was substantially undisputed that the firearms transactions occurred and that appellant did not have the requisite license. Nor do we think the present case is one in which "evidence of other crimes may be presented when 'they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged.'" United States v. Miller, 508 F.2d 444, 448-49 (7th Cir. 1974), cited in United States v. Derring, 592 F.2d 1003, 1007 (8th Cir. 1979); see also Carter v. United States, 549 F.2d 77, 78 (8th Cir. 1977) (res gestae).

> [T]he trial court has broad discretion in controlling closing arguments. Absent a showing of abuse of discretion this court will not reverse. "The dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial." We must view the prosecutor's remarks in the context of the entire trial.

United States v. Bohr, 581 F.2d 1294, 1301 (8th Cir.) (citations omitted), cert. denied, 439 U.S. 958 (1978); see also United States v. Segal, 649 F.2d 599, 604 (8th Cir. 1981); United States v. King, 616 F.2d 1034, 1040 (8th Cir.), cert. denied, 446 U.S. 969 (1980); United States v. Splain, 545 F.2d 1131, 1135 (8th Cir. 1976) (no per se rule). We find no reversible error.

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5 continued

> However, appellant has not demonstrated that the admission of this evidence so adversely affected substantial rights as to result in a miscarriage of justice. Fed. R. Crim. P. 52(b); see, e.g., United States v. Kutrip, 670 F.2d 870, 877 (8th Cir. 1982), citing United States vs. Big Crow, 523 F.2d 955, 960-61 (8th Cir. 1975), cert denied, 424 U.S. 928 (1976).

The first remark challenged by appellant was a reference to the intent of Congress in passing the firearms statutes.[6] As noted in United States v. Norton, 639 F.2d 427, 429 (8th Cir. 1981) (citations omitted), "[t]his Court has previously held that testimony concerning the purpose of the Gun Control Act has little or no probative value in a trial for violation of the Act. There is even less justification for allowing the prosecutor to 'testify' in closing argument about the statute's purpose." We find no basis for reversal. Unlike Norton, in the present case the reference was brief and general in terms and the defense objection was sustained by the district court. The district court did not give a cautionary instruction to the jury; however, none was requested by defense counsel and, under the circumstances, we see no reason why the district court should have given such an instruction sua sponte.

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[6]The prosecutor, speaking in general terms about the federal firearms statute, stated:

> Now, what Congress intended to do is keep these guns out of the hands of convicted felons, but Congress also wanted to attack the problem at the root of the problem. The problem with these guns moving interstate, going overseas -- Congress passed the Safe Streets Act to address that problem.

Appellant also challenges the prosecutor's references to Thomas Auerbach as a convicted felon and his allegedly lying about his car theft conviction. Defense counsel did not object to this portion of the closing argument. We find no plain error. See United States v. Segal, 649 F.2d at 604 n.10. Thomas Auerbach's status as a convicted felon was already before the jury as an element of the government's unlawful possession charges against him. Defense counsel in closing argument addressed the question whether Thomas Auerbach had lied about his conviction, explaining that he had run away from home when he was eighteen years old and evidently stole two cars in the process, his father's and another person's.

Appellant also challenges the prosecutor's reference to "the type of weapons that have been used by snipers around the country. These are the same types of weapons." The district court sustained the defense objection and instructed the jury that there was no issue in the case about the type of weapon or about possession of illegal weapons. Defense counsel's subsequent motion for a mistrial was denied. Appellant argues on appeal that the sniper reference was prejudicial and inflammatory in the context of the attempted assassinations of President Reagan and Pope John Paul II during the spring of 1981 and therefore the district court should have declared a mistrial. We find no abuse of discretion in the district court's failure to declare a mistrial.

Although the sniper reference was emotional, irrelevant and improper,[7] it was an isolated remark and was promptly condemned by the district court.

We note that the cumulative effect of the prosecutor's improper remarks upon the jury came dangerously close to requiring reversal in the present case. We affirm, however, because of the prompt remedial action taken by the district court and relatively strong evidence. We note, however, that we have been called upon with unnecessary frequency to review allegations of prosecutorial misconduct. E.g., United States v. Singer, 660 F.2d 1295, 1305 (8th Cir. 1981), cert. denied, 102 S. Ct. 1030 (1982). Many of the alleged instances of prosecutorial misconduct had some merit, but have not required reversal, and could have been avoided by restraint on the part of the prosecutors. Such restraint would not in

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[7]The government argues that the sniper reference was a fair response to defense counsel's closing argument that the firearms involved in the case were sporting weapons or hunting guns. We disagree; the government could have adequately rebutted the defense argument without introducing snipers. Nor do we think that the fact that the recent assassination attempts involved persons using handguns at close range, and thus did not involve a "typical" sniper, makes much difference.

any way impede vigorous prosecution. We strongly warn prosecutors to scrupulously avoid making the type of emotional, irrelevant remark disapproved herein. Once again we repeat the admonition of Justice Sutherland in Berger v. United States, 295 U.S. 78, 88 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to product a wrongful conviction as it is to use every legitimate means to bring about a just one.

Appellant next argues that the long period of preindictment delay denied him due process. We disagree. The last firearms transaction occurred at the end of May 1979; the indictments were returned in March 1981. The twenty-two month delay did require investigation by the district court. Following a pretrial hearing on

appellant's motion to dismiss the indictment, the district court concluded that appellant had failed to demonstrate actual prejudice and that the preindictment delay was due to ongoing undercover investigations and not an attempt to gain a tactical advantage over the defendants. These findings are not clearly erroneous. Even assuming that appellant had shown prejudice, preindictment investigative delay cannot ordinarily be charged against the government. See, e.g., United States v. Reed, 647 F.2d 849, 852 (8th Cir. 1981; United States v. Hood, 593 F.2d 293, 296 (8th Cir. 1979); United States v. Matlock, 558 F.2d 1328, 1338 (8th Cir.), cert. denied, 434 U.S. 872 (1977).

Appellant next argues that the conduct of the special agents in investigating and developing the case against him was so outrageous as to constitute "entrapment as a matter of law" because the special agents initially approached him and repeatedly solicited firearms transactions. We have carefully reviewed the record and conclude that the district court did not err in finding that the special agents' involvement, although substantial, was not so outrageous or fundamentally unfair as to bar appellant's prosecution and conviction. See, e.g., United States v. McCaghren, 666 F.2d 1227, 1230-31 & nn. 5-8 (8th Cir. 1981); United States v. Quinn, 543 F.2d 648, 647-48 (8th Cir. 1976); see also Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973). Here, the evidence showed that the special

agents set up the undercover investigation and approached appellant and his son after receiving information from other law enforcement officials connecting the Auerbachs with firearms violations. This is evidence of predisposition and relevant to the conventional entrapment defense. See United States v. Quinn, 543 F.2d at 647-48 (discussing "conventional" unlawful entrapment and outrageous government conduct entrapment).[8]

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[8]The conventional concept of "unlawful entrapment" is that a criminal intent or design is deliberately implanted in the mind of an innocent person by government agents including informers and undercover agents, and that a person is not unlawfully entrapped if he has a predisposition to commit the crime, and if the agents simply give him the opportunity to commit it and work in concert with him in committing it or attempting to commit it. Whether a person has been entrapped in that sense of the term is ordinarily a question of fact for the jury with the burden being on the government to prove an absence of entrapment. . .

United States v. Quinn, 543 F.2d 640, 647-48 (8th Cir. 1976)(citations omitted).

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1737 September Term, 1981

United States of America,

Appellee,

vs.

Wilbur Lee Auerbach,

Appellant.

This appeal from the United States District Court for the Southern District of Iowa was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment and commitment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

July 6, 1982

A True Copy:

ATTEST: Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF
AMERICA

vs.

WILBUR LEE AUERBACH DOCKET NO. CR. 81-26

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: July 2, 1981

COUNSEL: Lyle A. Rodenburg

PLEA: Not Guilty

FINDING & JUDGMENT:

Defendant has been convicted as charged of the offense(s) of violation of Title 18, United States Code, Section 922(a)(1) and 924(a) as charged in Count 1 and violation of 18, United States Code, Section 371 as charged in Count 7 of the indictment filed herein.

SENTENCE OR PROBATION ORDER:

It is adjudged as to Count 1 that the defendant pay a fine to the United States in the sum of $5,000.00.

It is adjudged as to Count 7 that the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of three (3) years on the following terms and conditions:

1. That he comply with all local, state and federal law,

2. That he comply with the rules and regulations of the Probation Department.

SIGNED BY: Harold D. Vietor,
U. S. District Judge

DATE: July 2, 1981